

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEON BENZER,

Defendant.

Case No.: 2:13-cr-0018-JCM-GWF

ORDER

Scaled Ex Parte Motion (#433)

This matter is before the Court on Defendant Leon Benzer's *Ex Parte* Motion for Issuance of a Subpoena Duces Tecum (#433) filed under seal on December 8, 2014.

As stated in *United States v. Sellers*, 275 F.R.D. 620, 624 (D.Nev. 2011), courts are split as to whether a party may make an *ex parte* application for a pretrial subpoena *duces tecum* under Rule 17(c) of the Federal Rules of Criminal Procedure. The Ninth Circuit has not addressed the issue. Some courts have held that under no circumstances may a party make an *ex parte* application for a subpoena *duces tecum*. Other courts have held that a party may make an *ex parte* application where the source or integrity of evidence would be imperiled or the party's trial strategy would be disclosed if the motion were served on the other party. *Id.*, citing *United States v. Beckford*, 964 F.Supp. 1010, 1025-31 (E.D.Va. 1997); *United States v. Daniels*, 95 F.Supp.2d 1160, 1162-63 (D.Kan. 2000); and *United States v. Tomison*, 969 F.Supp. 587, 589-95 (E.D.Cal. 1997). *See also United States v. McClure*, 2009 WL 937502, *1 (E.D.Cal. 2009). Judges in this district have held that a defendant may file an *ex parte* motion for the issuance of subpoenas *duces tecum* under Rule 17(c) upon a showing of the need for confidentiality. *See Sellers, supra* and *United States v. Andrade*, 2013 WL 3029194, *2 (D.Nev. 2013).

1 Defendant has not made any showing that it is necessary to file the instant motion *ex parte*.
2 Nor does there appear to be any basis for *ex parte* filing. The proposed subpoena does not seek
3 evidence directly relating to the Defendant's guilt or innocence on the charges in the indictment.
4 Rather, the subpoena is directed at obtaining PACER billing records to determine whether
5 newspaper reporter Jeff German or the Las Vegas Review Journal obtained the Benzer proffer
6 materials from the docket in this case during the time period that those materials were on file and
7 publically available. The purpose for which the subpoena is sought is no secret and is, in fact,
8 discussed in Defendant's *Reply in Support of Motion to Dismiss* (#420), pg. 2 n. 2. The Review
9 Journal has also anticipated that Defendant would seek a subpoena for its PACER records and has
10 addressed a letter "To Whom It May Concern" requesting notification if such a motion is filed.
11 The letter indicates that it has been delivered to the district judge, the undersigned magistrate judge
12 and counsel for Defendant Benzer and the Government. Mr. German and the Las Vegas Review
13 Journal have an interest in the subject matter of the subpoena and whether it should issue because
14 the information sought pertains to their PACER account(s). *See In re Grand Jury*, 111 F.3d 1066,
15 1073-74 (9th Cir. 1997). Accordingly,

16 **IT IS HEREBY ORDERED** that Defendant Leon Benzer's *Ex Parte* Motion for Issuance
17 of a Subpoena Duces Tecum (#433) is **denied**, without prejudice. Defendant may file a motion for
18 issuance of the subject subpoena with notice and a copy of said motion being served on the
19 Government and on the interested non-parties, Jeff German and the Las Vegas Review Journal.

20 DATED this 11th day of December, 2014.

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23 GEORGE FOLEY, JR.
24 United States Magistrate Judge
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